In the Supreme Court of the United States

OCTOBER TERM, 1971

No.

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

UNION CARBIDE CORPORATION

CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The Solicitor General, on behalf of the National Labor Relations Board, petitions for a writ of certiorari to review the part of the judgment of the United States Court of Appeals for the Fourth Circuit that declines to enforce the Board's order relating to employee Mullins, but only if the Court grants the Company's petition in No. 70-200, which the Board is opposing.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-9a)[1] is reported at 440 F. 2d 54. The Board's decision and order (Pet. App. 10a-35a) are reported at 174 NLRB No. 147.

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[1] "Pet. App." references are to the appendix to the petition in No. 70-200.

JURISDICTION

The judgment of the court of appeals (Pet. App. 9a-10a) was entered on March 2, 1971. On May 18, 1971, the Chief Justice extended the Board's time for filing a cross-petition to and including July 23, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the court of appeals erred in holding that an employee who refused to cross a lawful picket line at his own employer's premises, established by fellow employees in another department, was not entitled to the protection of the National Labor Relations Act because his refusal was motivated by "fear" rather than by a desire to make common cause with the strikers.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are set forth at pages 2-3 of the petition in No. 70-200.

STATEMENT

Briefly,[2] the Board found that three of Union Carbide's construction department employees had en-

[2] The Board refers the Court to its brief in opposition in No. 70-200 for a full statement of the facts and the decisions below.

gaged in concerted activity protected by Section 7 of the Act when they refused to cross a picket line established by fellow employees in another department who were on strike against the Company. The Board found that the Company had violated Section 8(a)(1) of the Act by threatening to discharge, and then actually discharging, the three employees for engaging in such activity. (Pet. App. 21a-23a, 28a-29a, 34a.) The Board ordered the Company, *inter alia*, to reinstate the three employees and to make them whole for any loss of pay from the date the strike was terminated (Pet. App. 34a).

The court of appeals enforced the Board's order as to two employees who testified that they refused to cross the picket line as "a matter of principle," but refused to enforce it as to the third employee (Mullins), who testified that he had refused to cross the line out of "fear." The court reasoned that Mullins was not making common cause with his fellow employees, and therefore his refusal could not be deemed activity protected by Section 7. (Pet. App. 4a-5a, 9a.)

REASONS FOR GRANTING THE WRIT

In No. 70-200, the Company is challenging the court of appeals' decision insofar as it upheld the Board's order with respect to the two employees who refused to cross the picket line as a matter of principle. The Board thinks that decision is correct, and it opposes review in No. 70-200 for the reasons set forth in its brief in opposition in that case. If, however, the Court should grant that petition, the Board

believes that the issue with respect to the third employee (Mullins), who refused to cross the picket line because of fear rather than conviction, is sufficiently interrelated to the issue in No. 70-200 that the Court should review the entire case.[3]

The reasons why the Board believes that Mullins' refusal to cross the picket line was protected activity may be briefly stated. Regardless of whether Mullins subjectively intended to "make common cause" with the strikers or "contribute to mutual aid or protection" (Pet. App. 5a), the necessary effect of his refusal to cross the picket line was exactly that. Accordingly, the Company's action in discharging him for his refusal restrains the exercise of Section 7 activity, and thus violates Section 8(a)(1) of the Act. Cf. *National Labor Relations Board* v. *Burnup & Sims, Inc.*, 379 U.S. 21. Moreover, since employees usually have a complex of motives for refusing to cross a picket line, an inquiry into motive, long after the event, is not likely to be reliable.[4] As this Court observed in another context: "any rule that requires a probe of an employee's subjective motivations * * * involv[es] an endless and unreliable inquiry." *Na-*

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[3] Since the court of appeals below subsequently has distinguished, although not overruled, its holding with respect to Mullins (*Virginia Stage Lines* v. *National Labor Relations Board*, No. 14,841, April 5, 1971, 76 LRRM 3057, 3059, n. 3), the issue in the present petition independently would not be sufficiently important to warrant review.

[4] Thus, Mullins testified that fear was his "main reason" (A. 98), which implies that there may have been other reasons which he could not articulate or recall. "A." refers to the appendix to the briefs in the court below.

tional Labor Relations Board v. *Gissel Packing Co.*, 395 U.S. 575, 608.

CONCLUSION

If the Court grants the petition for a writ of certiorari in No. 70-200, this petition for a writ of certiorari should also be granted.

Respectfully submitted.

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